Responses to questions related to IRS Notice 2006-24, Qualifying Advanced Coal Project Program. April 25, 2006

13. <u>Definition of nameplate capacity</u> - While total nameplate capacity is a measure of capacity that the Treasury and the IRS have used in the past, there are circumstances in which total "nameplate capacity" of a project will not reflect the amount of plant capacity that the project is capable of providing. Specifically, a generating facility's nameplate capacity is only relevant to the extent that it reflects the amount of output that actually can be generated.

Response 13– Please refer to the IRS for a response to this question. Also see Response 3a, which can be found in file "Responses for Notice 2006-25 April 10, 2006"

14. <u>Determination of the Amount of Credit Requested -</u>

(i) The notice suggests that an applicant may bid for a lesser amount of credit than its project would be entitled to under the statute. Since this would have the effect of increasing the ratio of nameplate capacity to amount of credit requested, applicants may be tempted to do so in order to "under-bid" other projects as described in section 4.02(2)(a) or other priority projects under the allocation provisions in section 4.02(4) of the notice. This underbidding for the credit is not contemplated by the statute, and in fact is contrary to its purpose – which is to help cover a portion of the cost differential between uses of advanced coal-based generation technology versus use of conventional pulverized coal technology.

(ii) It is not clear what will happen in that circumstance where the requested allocation of credits by qualifying projects exceeds the aggregate cap for that credit and how the ratio of nameplate capacity to credits requested would then operate.

Response 14 (i) (ii)– Please refer to the IRS for a response to these questions. See also Response 3a ("Responses for Notice 2006-25 April 10, 2006")

15. <u>DOE analysis and treatment of "priority items" and use of "program policy factors"</u>

(i) Section 4.02(2)(b) provides that, with respect to IGCC facilities, the credit will be allocated first to projects entitled to priority under section 48A(e)(3)(B), for greenhouse gas capture capability or increased by-product utilization. Notice 2006-24 does not define "increased by-produced utilization" or further define "greenhouse gas capture capability" or "other benefits". Also, Notice 200624 does not define how these items will be analyzed. It is not clear, for example, whether DOE will make a comparative evaluation among applications as part of the

certification process or whether the IRS will evaluate these items or simply apply a "meet or do not meet" analysis of the IGCC facilities certified by DOE.

Response 15(i) See response 1 b,c,d,e. ("Responses for Notice 2006-25 April 10, 2006") "No additional information related to the criteria or ranking process will be released".

(ii) Section 4.02(9) and Appendix B of the notice at page 42 describe a set of "program policy factors" to be used by DOE in the evaluation of applications. These program policy factors are not set forth in the authorizing legislation per se and may be a source of significant controversy if applied in a manner that suggests the DOE has great discretion and latitude to make final choices among equally qualified projects based upon what appear to be very subjective criteria.

Response 15 (ii) DOE has asked the IRS to amend notices 2006-25 and 2006-26 to remove Appendix B, Section F.

16. <u>Definition of the term "project"</u> - The section 48A credit is an unusual one in that a taxpayer will apply for the credit before it even has to build or complete a facility and even before it even has to sign an engineering, procurement and construction ("EPC") contract with respect to construction of the facility. It is important that the allocation of credit by the DOE and the IRS not be administered in a way that hamstrings development of the project. Notice 2006-24 is unclear as to whether and to what extent an applicant can change the project once the application is submitted on June 30, 2006. A great variety of things (site, technology, vendor, construction contractor) may not be finalized by June 30. Even if finalized, by contract, change may be required.

Another example of a need for flexibility relates to the ultimate site of a project. It is typical when a project is under development for a taxpayer to perform a site study and rank a number of potential sites. It happens on occasion that the highest ranked site eventually proves unusable (as a result of local opposition, unexpected environmental impediments, etc.), and the taxpayer must turn to the second ranked site. Doing this should not cause a taxpayer to lose its allocation of credits.

Response 16. - Viability of the proposed site is a key component in DOE's evaluation of overall project feasibility. DOE recognizes that minor plant and process changes can occur during the detailed design or construction phase of a project. However, unresolved site suitability and availability issues usually result in serious delays from the original project schedule. Projects with multiple unresolved site issues would have questionable ability to meet the firm 7 year requirement for placing the project in service. Section 8.04(1).

17. <u>Measurement of the coal requirement for a qualifying project –</u>

a. Notice 2006-24 provides that the fuel for the project must be at least 75% coal on an "energy input" basis. Appendix B at D.II. However, the notice does not state how to measure the coal usage for other purposes of the Code and the notice. For example, the notice is silent (see: section 5.02(5)) on how to measure the type of coal being used as the primary coal-type.

Response 17a. DOE has recommended that the IRS clarify Notice 2006-25 to provide all fuel input measurements are made on an energy input basis (by Btu).

b. A further clarification should be provided that at the time of plant startup and shake-down, the use of coal requirement will take into account the need to use alternative fuels or practices whereby coal will not be used for 75% of the time nor the designated coal for 50% of the time.

Response 17 b. – DOE has recommended that IRS amend the Notice 2006-25 and 2006-26 to allow non-coal fuels to be used during initial plant certification and during plant startup and shutdown periods.

18. <u>Treatment of information provided by an applicant</u>

Code section 48A (d) (2) (B), requires that "[a]ny information contained in the application shall be protected as provided in section 552(b) (4) of title 5, United States Code." Section 552(b) (4) provides that "trade secrets and commercial or financial information obtained from a person and privileged or confidential" is not public information. Notice 2006-24 is silent concerning the information that the IRS and DOE will keep confidential and the information that will be made public.

Response 18. See response 5a. ("Responses for Notice 2006-25 April 10, 2006")

19. <u>Modification of the certification process</u> The Code (at section 48A(d)(2)(D) and (e)(2)) requires that certain additional steps be met within two years after the date of acceptance by the IRS of the application. Notice 2006-24 implements this requirement, providing that within two years from the date that the IRS accepts the taxpayer's application, the taxpayer must submit documentation establishing that these requirements are satisfied. Section 6.02. After receiving this material, the IRS will decide whether or not to certify the project and will notify the taxpayer, by letter, of that decision. Section 6.03

This final step to certification should be treated as more of an iterative process and less of a "meet the requirements on your first shot or lose the credit" type of process. To that extent, the principle is to meet the statutory requirements within the two-year period but provide the otherwise successful applicant with an opportunity to cure any deficiency.

Response 19 – DOE is evaluating the feasibility of the proposed project schedule under the assumption that the 2 and 7 year deadlines are firm. Please refer to the

IRS for a further response to this question.

20. <u>Allocating Credits for Projects that Plan to Apply for Both Section 48A and Section 48B Credits –</u>

a. For those projects that plan to apply for both 48A and 48B credits, the Notice is unclear as to whether the gas produced by the project will need to be split between the two functions. For example, as noted above in discussing the definition of nameplate capacity for section 48A purposes only that portion of the gas proposed to be used to generate electricity should be applied to section 48A. For example, assume that a project produces sufficient gas such that, if all of the gas was run through the electric generating facility, it would fully, but just fully, be adequate for a generating facility with a nameplate capacity of 600MW to operate at full capacity. However, assume that the project expects that 1/3 of the gas will be sold and that the project is requesting section 48B credits based upon these expected sales. The nameplate capacity of the generating facility, for purposes of section 48A, would be limited by a supply constraint so that the nameplate capacity only would be considered to be 2/3 of 600MW or 400MW.

In addition, note that section 48B allows for the gasification of coal, pet-coke, biomass, etc., and is not subject to the fuel limitations for section 48A. For any project applying for both the section 48A and section 48B credits, it should be made clear that feedstock is fungible and that measurement of the 75% coal requirements and 50% requirement based on type of coal must be met for the gasifier as a whole and that the operation of the gasifier for the purpose of section 48A eligibility must be maintained on the basis of the required coal input.

b. Questions regarding the use of section 48A and section 48B – (i) Will an industrial gasification project applying for section 48B credits be considered in competition with an IGCC polygeneration project that applies for both the section 48A and section 48B credits as the latter project relates to the use of the syngas for non electricity generation purposes? How will the allocation between section 48A and section 48B credits be determined?

c. Additional clarifying questions –

(i) With respect to section 48B, is the maximum $650 million per project of qualified investment relative to the entire facility or only the gasification section of the facility?

Response to 20a,b,c(i) – Please refer to the IRS for a response to these questions.

(ii) With respect to the requirement for “an Excel based financial model of the project” required at Appendix B, Section VII, how much and what type of financial detail is needed when proposing a project in a regulated environment versus a non-regulated environment?

Response 20c(ii) - Appendix B does not distinguish between projects in a regulated environment versus a non-regulated environment.

(iii) With respect to the requirement of Appendix B, section G related to an independent financial analyst, who does the DOE not consider to fit the definition of an independent financial analyst. For example, would an independent consultant, not a financial institution or financial advisory firm/corporation qualify?

Response 20c(iii)- See response 6a. ("Responses for Notice 2006-25 April 10, 2006") There is no approved list. "The independent advisor/reviewer should provide their qualifications".